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## **The Multi-option Referendum: international guidelines, international practice and practical issues**

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**Abstract**

This is a paper prepared by Stephen Tierney on 10 August 2012 and sent to the Scottish Government Head of Elections Team, Mr Stephen Sadler. The paper offers an account of the practical issues surrounding the framing of a two question referendum in the broader context of multi-option referendums in general.

**Keywords**

Referendum, multi-option, direct democracy, constitutional law, public law, Venice Commission, international standards

**‘The Multi-option Referendum: international guidelines, international practice and practical issues’**

Stephen Tierney, Professor of Constitutional Theory, School of Law, University of Edinburgh and Director of the Edinburgh Centre for Constitutional Law

**10 August 2012**

**Background**

This is a paper prepared by Stephen Tierney on 10 August 2012 and sent to the Scottish Government Head of Elections Team, Mr Stephen Sadler. On 5 July 2012 Professor Tierney accepted an appointment to offer objective and independent advice to the Scottish Government on the process-related issues covered in the consultation paper (*Your Scotland, Your Referendum*)<sup>1</sup>.

In the course of this commission he agreed to submit occasional papers to the Scottish Government in response to specific requests for information in light of international best practice on the technicalities of, and practicalities surrounding, referendum practice. This is in the end the only paper which he submitted to the Scottish Government.

This Memorandum is written by Stephen Tierney in a personal capacity and not from, or on behalf of, the University of Edinburgh.

In this Memorandum Professor Tierney offers no view as to the legal competence of the Scottish Parliament to pass a bill in relation to the holding of a referendum on constitutional change. He also offers no personal view as to whether or not the holding of a multi-option referendum would be an appropriate way to help determine Scotland’s constitutional future.

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<sup>1</sup> Scottish Government Consultation Paper, January 2012.

## EXECUTIVE SUMMARY

This Memorandum offers an account of the practical issues surrounding the framing of a two question referendum in the broader context of multi-option referendums in general:

- A multi-option referendum presents voters with more than two options addressing the *same issue*, each of which is *distinctive*, leading to *one* outcome. (**Section 1** below)
- Multi-option referendums are very rarely used. (**Section 2**)
- Binary referendums are widely believed to offer a simpler means of decision-making. (**Section 2**)
- Multi-option referendums tend to be used where the issue facing a polity points to more than two options each of which commands significant levels of support. (**Section 2**)
- Non-binding international guidelines concerning good practice in referendums have been issued by the Venice Commission of the Council of Europe. These contain recommendations on good practice applicable to the setting of referendum questions for either a binary or multi-option referendums. Multi-option referendums are neither expressly endorsed nor objected to by the Venice Commission guidelines. (**Section 3**)
- There are four main models of multi-option referendums that have been used internationally (**Section 4**):
  - The ‘run-off’ model using two referendums
  - The plurality model with no ‘50% plus’ majority threshold
  - The gateway, filter and run-off model over two referendums
  - The gateway and final decision model in one referendum
- Another possible model which has not been widely used is:
  - Preferential voting in one referendum with a model of proportional decision-making.
- The following principles are used to assess the different methods of decision-making by way of a multi-option referendum: the facilitation of active participation by citizens; the facilitation of public reasoning and deliberation; and the maximisation of collective consent among assenters and satisfaction with the process among dissenters. (**Section 5**)
- In terms of these principles the gateway, filter and run-off model over *two referendums* (as used in New Zealand) seems to have worked well in filtering a number of options *greater than three* down to two for a final decision. (**Section 5**)
- There are a number of models based upon the gateway and final decision model that offer different ways of determining a *three option* issue by way of two questions in *one referendum*. (**Section 6**)

Three such models are assessed in the Memorandum (**Section 6**):

- Model A: the Change/No Change Gateway Model;
- Model B: the 'Knock-out' Model; and
- Model C: the Preferential Model

All three models A-C would ensure that, to be successful, a model of constitutional change must win over 50% support in a binary vote against either the status quo or another option for change. It seems that models A and C would each be more likely than Model B to arrive at an outcome where it can be concluded with reasonable certainty that the winning option is preferred to the two other options by a majority of voters.

## Introduction

In a letter from the First Minister dated 20 July 2012 I was informed that the Scottish Government would like to give further consideration to the mechanics of how a two question referendum would work in practice. The letter sought my advice on ‘the practical arrangements for the operation of such a referendum’ confirming that this advice ‘will be separate from the testing of the actual question or questions to be proposed by the Scottish Government.’

This Memorandum offers an account of a two question referendum in the broader context of multi-option referendums in general, looking to the practicalities involved in staging a multi-option referendum, and in doing so addressing the following questions and issues:

1. What is a multi-option referendum?
2. The multi-option referendum in context
3. International Normative Guidelines
4. International Practice: situations where the multi-option referendum has been used
5. Assessing the different methods of decision-making by way of a multi-option referendum
6. Assessing how a decision might be reached in a three option/two question referendum

### 1. What is a multi-option referendum?

In a multi-option referendum voters are presented with more than two options addressing the *same issue*, each of which is *distinctive*, leading to *one* outcome. This can be distinguished from other multi-question referendums where the voters are offered a number of binary votes on different issues leading to multiple decisions.

### 2. The multi-option referendum in context

The use of the referendum in processes of constitutional change has expanded greatly in the past three decades. It has been estimated that of the 58 functioning electoral democracies with a population of more than three million, 39 had conducted at least one national referendum between 1975 and 2000.<sup>2</sup> The number of countries using referendums for the first time and the number of referendums occurring at sub-state level has also continued to grow to the present day. Despite this period of proliferation, multi-option referendums are very rarely used. The vast majority of referendums offer a binary choice between two options. This method offers a simpler means of decision-making than a multi-option poll. The general preference for binary

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<sup>2</sup> Lawrence LeDuc, *The Politics of Direct Democracy: Referendums in Global Perspective* (Broadview Press 2003) 29.

choice referendums might also explain how little focus we find on multi-option referendums within international normative guidelines (see **Section 3**).

Despite the general preference for binary referendums, arguments can be found for multi-option referendums. The House of Lords Select Committee on the Constitution concluded in a report in 2010: ‘We recommend that the presumption should be in favour of questions posing only two options for voters but recognise that there may be occasions when multi-option questions are preferable.’<sup>3</sup> In general we are more likely to find support for a multi-option referendum where the issue facing a polity points to more than two options commanding significant levels of support. As John Curtice observed in evidence to the House of Commons Select Committee on Scottish Affairs: a ‘referendum is less likely to resolve an issue if it fails to encompass (and specify fairly) what are widely regarded as all of the key policy alternatives.’<sup>4</sup>

There are notable cases where the multi-option referendum has been used (see **Section 4**). In some of these situations it is widely considered to have worked generally successfully; in others its use has been more problematic. In **Section 4** I will address the main international precedents focusing upon the mode of decision-making in these referendums. In **Section 5** I will analyse the main decision-making options available in multi-option referendums before focusing specifically on the two question model in **Section 6**. An **Executive Summary** is set out above.

### **3. International Normative Guidelines**

Over the past decade international guidelines for good practice in referendums have begun to emerge. However, these guidelines have very little to say about multi-option referendums specifically. In particular, multi-option referendums are neither expressly endorsed nor objected to by the Venice Commission regime ((ii) below). Of course the guidelines issued by the Venice Commission are not legally binding on member states of the Council of Europe but they do carry the mandate of the Council and member states are expected to comply with these principles.

#### **(i) Background**

With the proliferation of the referendum in central and eastern Europe in the early 1990s the Council of Europe has been active in establishing guidelines for good electoral practice.

The Venice Commission of the Council of Europe has been specifically engaged in this process and has published guidelines specific to the referendum. Two documents are particularly significant. First, the ‘Guidelines for Constitutional Referendums at National Level’<sup>5</sup> were issued in 2001 (‘the 2001 Guidelines’). This document prescribes good practice in a number of areas, and as the title suggests these guidelines are specific to the context of *constitutional* referendums. The areas covered

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<sup>3</sup> ‘Referendums in the United Kingdom’, House of Lords Select Committee on the Constitution Report with Evidence, HL Paper 99, para 159.

<sup>4</sup> House of Commons Select Committee on Scottish Affairs, Report: The Referendum on Separation for Scotland’, HC 1608, 2010-12.

<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmsscota/1608/1608we20.htm>

(NB: This was not and should not be read to be explicit support by Professor Curtice for a three option referendum on Scotland’s constitutional future.)

<sup>5</sup> European Commission for Democracy Through Law (Venice Commission), ‘Guidelines for Constitutional Referendums at National Level’ (11 July 2001) COE Doc CDL-INF(2001)10.



include: the legal framework; the procedural and substantive validity of texts submitted to a referendum; the franchise; fairness of the vote; funding, advertising and the media; and quorum rules. A second document, the Code of Good Practice on Referendums ('the 2007 Code'), was adopted by the Venice Commission at its 70th plenary session in March 2007.<sup>6</sup> This document covers referendums more generally.

The 2007 Code itself contains a set of 'Guidelines on the Holding of Referendums'. As such there is considerable crossover with the 2001 Guidelines. It is particularly notable that the 2007 Code also includes recommendations on compliance with international law.<sup>7</sup> This is explained clearly in the 2007 Code's Explanatory Memorandum:

'Irrespective of what national law has to say about the relationship between international and domestic law, texts put to a referendum must not be contrary to international law or to the Council of Europe's statutory principles (democracy, human rights and the rule of law).'<sup>8</sup>

In this context it is expected that any referendum will comply fully with established international law for good conduct in elections, freedom of expression, the right to vote etc.

#### **(ii) International Normative Guidelines and multi-option referendums**

As noted above, there are no provisions in the 2001 Guidelines and the 2007 Code directed specifically towards multi-option referendums. We can however draw guidance from the general provisions applicable to the setting of referendum questions more broadly. An important set of criteria for question-setting is presented in the 2001 Guidelines:

*Unity of form:* texts submitted to referendum have to comply with the principle of unity of form, meaning that the same question must not combine a specifically-worded draft amendment with a generally-worded proposal or a question of principle. [Comment: this is a reference to the format of each individual question (see the related issue of unity of content below for examples); it does not speak to the inclusion of more than one question on the ballot paper.]

*Unity of content:* by this principle, except in the case of a total revision of the constitution or another piece of legislation, there must be an intrinsic connection between the various parts of each question put to the vote in order to guarantee freedom of suffrage (the voter must not be expected to accept or reject, as a whole, provisions without an intrinsic link between them).<sup>9</sup> [Comment: this is a similar

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<sup>6</sup> Venice Commission, 'Code of Good Practice on Referendums' Study No 371/2006 (19 March 2007) COE Doc CDL-AD(2007)008rev.

<sup>7</sup> *ibid* III, 3.

<sup>8</sup> *ibid* para 33. The reference to 'texts put to a referendum' refer to the question and any other rubric appearing on the ballot paper.

<sup>9</sup> A referendum question proposed in Belarus in 2004 was found to be problematic because it ran two issues together as follows: 'Do you allow the first President of the Republic of Belarus Alexander Grigoryevich Lukashenko to participate in the presidential election as a candidate for the post of the President of the Republic of Belarus and do you accept Part 1 of Article 81 of the Constitution of the Republic of Belarus in the wording that follows: "The President shall be elected directly by the people of the Republic of Belarus for a term of five years by universal, free, equal, direct and secret ballot?" The Venice Commission was very critical: 'This combination in a single question of two distinct issues, one relating to an individual situation and one proposing a constitutional amendment, is in

consideration to unity of form and concerns the internal consistency and coherence of each question; again it does not speak to the inclusion of more than one question on the ballot paper.<sup>10]</sup>

*Unity of hierarchical level:* by this principle the same question must not relate simultaneously to the constitution and subordinate legislation.

[Comment: again this speaks to the internal consistency and coherence of each question so that each question does not contain two quite separate forms of law.]

*Clear and non-leading questions:* the question submitted to the electorate must be clear (not obscure or ambiguous); it must not be misleading; it must not suggest an answer; electors must be informed of the consequences of the referendum, in particular of the outcome of Yes or No majorities in response to each question; voters must answer the questions asked by yes, no or a blank vote.<sup>11</sup>

[Comment: this concerns issues of clarity and intelligibility. It does not speak to the inclusion of more than one question on the ballot paper except to make clear that each question should comply with each of these criteria for clarity etc.]

The 2007 Code largely reiterates the last of these principles, addressing this issue in the context of the ‘Freedom of voters to form an opinion’.<sup>12</sup> This again emphasises the imperative requirement that any question be clear, not misleading etc.

The General Remarks attached to the 2001 Guidelines offer additional detail on how the text of a referendum question might be presented:

‘The text submitted to referendum may be presented in various *forms*:

- a *specifically-worded draft* of a constitutional amendment, legislative enactment or other measure

- *repeal* of an existing provision

- a *question of principle* (for example: “Are you in favour of amending the Constitution to introduce a presidential system of government?”) or

- a *concrete proposal*, not presented in the form of a specific provision and known as a “*generally-worded proposal*” (for example: “Are you in favour of amending the

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contradiction with the principle of *unity of content* as set forth for example in the *Guidelines for Constitutional Referendums at National Level*, adopted by the Venice Commission in July 2001 (CDL-INF(2001)10, at II.C). Although two questions are put to the voters, they are not allowed to give a separate and distinct answer to each of these questions but have to reply in a uniform way.’

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), Opinion on the referendum of 17 October 2004 in Belarus, Adopted by the Venice Commission at its 60th Plenary Session (Venice, 8-9 October 2004).

<sup>10</sup> There is a reference to multi-option referendums in a Venice Commission Opinion on the draft referendum law in Serbia: ‘41. The second paragraph of Article 24 of the draft requires that “if two or more questions are subject to voting in the referendum, there shall be different ballots for each question”. The principle of *unity of content*, according to which “there must be an intrinsic connection between the various parts of each question put to the vote, in order to guarantee the free suffrage of the voter, who must not be called to accept or refuse, as a whole, provisions without an intrinsic link” (Code, III.2), is however not expressed explicitly in the law. This would be suitable.’ EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) OPINION ON THE DRAFT LAW ON REFERENDUM AND CIVIL INITIATIVE OF SERBIA, CDL-AD(2010)006, Opinion no. 551 / 2009, Strasbourg, 15 March 2010. The Commission makes no comment on the desirability or otherwise of holding different ballots for each referendum question, but does emphasise the ‘suitability’ of unity of content in each question asked.

<sup>11</sup> CDL-INF(2001)010, para. II.E.2.a. See also General Remarks para. II.C.

<sup>12</sup> 2007 Code: I, 3.1 c.

Constitution in order to reduce the number of seats in Parliament from 300 to 200?”).<sup>13</sup>

In a speech given by Pierre Garrone, Head of the Division of Elections and Referenda Secretariat of the Venice Commission (Council of Europe) this text was repeated. He also commented: ‘In most European states which use referenda, votes are possible both on specifically-worded drafts and questions of principle or generally-worded proposals.’<sup>14</sup> Again M. Garrone makes no reference to multi-option referendums as instances of either good or bad practice.

### **(iii) Summary of relevant international guidelines**

1. Multi-option referendums are neither expressly endorsed nor objected to by the Venice Commission regime.
2. The following international guidelines of good practice should be taken into account when setting multi-option referendums questions, as they should when setting a binary referendum question:
  - the same question must not combine a specifically-worded draft amendment with a generally-worded proposal or a question of principle;
  - there must be an intrinsic connection between the various parts of each question put to the vote;
  - the same question must not relate simultaneously to the constitution and subordinate legislation;
  - Each question (and by implication the overall ballot paper in a multi-option referendum) must be clear and not misleading;
  - Each question (and by implication the overall ballot paper in a multi-option referendum) must not suggest an answer;
  - Electors must be informed of the effects of the referendum, in particular of the outcome of Yes or No majorities in response to each question;
  - Voters must be able to answer each question asked solely by yes, no or a blank vote.

The text submitted to referendum may be presented in various *forms*:

- a *specifically-worded draft* of a constitutional amendment, legislative enactment or other measure
- *repeal* of an existing provision
- a *question of principle* or
- a *concrete proposal*.

## **4. International Practice: situations where the multi-option referendum has been used**

### **(i) A British precedent?**

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<sup>13</sup> General remarks para. II.C, 2.

<sup>14</sup> [http://www.stjornarskra.is/media/stjornarskra/PG\\_speech\\_rev.pdf](http://www.stjornarskra.is/media/stjornarskra/PG_speech_rev.pdf).

In the United Kingdom there has only been one referendum where more than one question was asked. This was the 1997 referendum on devolution for Scotland where two questions were put to voters. However, this referendum is not what is typically understood as a multi-option referendum per the definition in **Section 1** above. In 1997 voters were asked if they agreed or disagreed that there should be a Scottish Parliament. In the second question they were asked if they agreed or disagreed that the Scottish Parliament should have tax-varying powers. In the second question voters were being offered one specific, additional institutional feature which would supplement the one model of self-government on offer in the first question; the second question did not in itself offer a second self-standing option of self-government. This situation can be distinguished from a referendum offering voters two distinctive models of self-government – for example, independence and increased devolution – as is currently being discussed in the Scottish context.

However, the 1997 referendum may still be relevant when considering the viability of a multi-option referendum for the following reasons: first, in terms of structure, the referendum was not a simple one question, Yes/No format. Insofar as objections to multi-option referendum are based upon the capacity of voters to understand ballot design with more than one question, then this model is pertinent. Secondly, voters needed to understand that the effect of a majority Yes vote on the second question was contingent on a majority Yes vote on the first question.<sup>15</sup> When it comes to ‘gateway’ questions ((ii) **C.** and **D.** below) this notion of contingency is an important element in the design of the ballot.

## **(ii) Principal models of multi-option referendums**

For precedents of multi-option referendums as defined in **Section 1** we need to look abroad. I will now set out some of the most important multi-option referendums that have taken place around the world over the past century. These can be categorised in terms of a number of distinctive models of decision-making.

### **A. The ‘run-off’ model using two referendums**

**Newfoundland (1948)** A multi-option referendum was used in the process of determining the constitutional future of the United Kingdom’s Dominion of Newfoundland in 1948. On 3 June voters were offered three options. These were: a model of independent territory based upon ‘responsible government’, union with the Canadian Confederation, or the status quo (termed ‘Commission of Government’). The first option gained 44.6% support, the second 41.1% and the third 14.3%.

This led to a second referendum on 22 July. The two most popular options from the first referendum (responsible government and union with the Canadian

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<sup>15</sup> Notably Professor Vernon Bogdanor, in his written evidence to the House of Commons Select Committee on Scottish Affairs, was dismissive of the idea that Scottish voters would not understand a three option format: ‘the experience of New Zealand [discussed below] shows that there is no reason why the outcome of a multi-option referendum should not be clear-cut, decisive and legitimate. The experience of New Zealand also shows that voters are perfectly well able to understand the various choices available in a multi-option referendum. There is no reason why Scottish voters should be any less sophisticated. It would be patronising to argue otherwise.’ House of Commons Select Committee on Scottish Affairs, Report: The Referendum on Separation for Scotland’, HC 1608, 2010-12. <http://www.publications.parliament.uk/pa/cm201012/cmselect/cm��otaf/1608/1608we19.htm>

Confederation) were offered to voters. The confederation option won by 52.3% to 47.7%.

**Guam (1982)** A multi-option referendum was staged in Guam on political status. Six options were put before the people. The two most popular options were a Commonwealth relationship with the United States (48.5%) and statehood within the United States (26%). Only 10% voted to maintain Guam's status as an unincorporated territory. Similar to the model used in Newfoundland a second 'run-off' referendum was then held pitting Commonwealth status against statehood; 73% voted for the former. The United States has failed to implement the referendum result.

## **B. The plurality model with no '50% plus' majority threshold**

By this model the option gaining the largest share of the vote, regardless of its overall total, is deemed to have won.

**Finland (1931)** In Finland a referendum was held on prohibition. It contained three options. The polling result was: 70.5% (abolition of prohibition); 28.1% (for prohibition); 1.4% (regulation of alcohol content). The decision-making model was a plurality one, with the option polling more votes than any other deemed the winner. The resounding vote for one option made the result uncontroversial.

**Sweden (1957)** Sweden has held two notable multi-option referendums. In 1957 an advisory referendum concerning a pension scheme was put to the voters. This is unusual among multi-option referendums in that, like the Finnish referendum of 1931, it did not involve a constitutional issue. Three options were put to the voters resulting in the following split in the vote: Option 1: 45.8%, Option 2: 15.0% and Option 3: 35.3%.

Since no one option polled over 50% there was considerable disagreement and confusion over the implications of the vote. It also made it very difficult for the Social Democrat-dominated government to implement the first option and it was frustrated in these efforts by the second chamber of parliament. Indeed, opponents relied on the lack of overall majority support for this option in their refusal to endorse its implementation.

**Sweden (1980)** On 23 March 1980 another advisory referendum, this time on nuclear power, was held in Sweden. Again the ballot contained three options. Each of these options was set out in elaborate and detailed ways and the ballot paper as a whole could in several respects be considered both confusing and suggestive to citizens. It is also the case that two of the options on the ballot were very similar in content to one other. On both of these grounds this referendum would seem to fall short of the Venice Commission guidelines on question-setting. The results were also very inconclusive, with the following split in the vote: Option 1: 18.9%; Option 2: 39.1%; Option 3: 38.7%.

**Cambodia (1960)** This again was a plurality referendum offering four choices on policy options for the country. The policies of Norodom Sihanouk (who was variously King or head of state over a long period of post-war Cambodian history) received almost 100% of the vote. This referendum is widely seen as being democratically

problematic not so much for its multi-option nature as due to allegations of elite manipulation of the campaign and result.

**Puerto Rico (1967)** is another example of the plurality model. Here a referendum was held on the constitutional status of the territory, offering voters three options: autonomous commonwealth status, associated with the USA; the possibility of becoming a state within the United States constitutional structure; and a form of independence. These options polled 60.5%; 38.9%; 0.6% support respectively. The first option was taken to be victorious. Unlike the Swedish referendums this outcome was relatively uncontroversial with the victorious option polling well over 50% of the vote. But in **1993** in another referendum the split was less clear: 48.6% for Commonwealth status; 46.3% for statehood within the US and 4.4% for independence. More bizarrely, in the last referendum on this issue to date in **1998** 50.3% voted for 'none of the above' against four other options of which the only significant support was for statehood within the US (46.5%) and independence (2.5%). Commonwealth status polled less than 1% after a campaign arguing that the way this option was framed was not in the interest of Puerto Ricans and therefore that they should vote for the 'none of the above' option.

**Australia (1977)** Here a plebiscite (rather than a referendum as defined by the constitution of Australia) was held on the subject of a national anthem. Four choices were put to the people and Advance Australia Fair was deemed to have won on the basis of a 43% share of the vote (its nearest rival Waltzing Matilda polling 28.2%).

**Singapore (1962)** Three options were put to the people, each offering different terms for a merger with Malaysia. An option proposing merger but retaining elements of autonomy won 71% of the vote. Here a threshold was in place, with any measure requiring two thirds support to effect constitutional change, so in this sense this was not a plurality model in the first past the post sense. The winning option of course met this standard. This referendum, like that in Cambodia, was again subject to claims of elite manipulation and was widely boycotted.

### **C. Gateway, Filter and 'run-off' model over two referendums**

**New Zealand (1992-93)** The two referendums held in New Zealand in 1992-93 concerned electoral reform. The model used combined a 'gateway' and 'filter' multi-option referendum to narrow down the options, followed by a second 'run-off' referendum.

First, on 19 September 1992, a non-binding referendum was held asking voters two questions. The first 'gateway' question asked if they wished to retain the present first past the post (FPP) electoral system or if they wanted to change it. 84.7% to 15.3% voted in favour of a change to the electoral system. The second 'filter' question asked which system should replace the present system, offering four options. This referendum led to a second, binding, run-off referendum the following year, which was held at the same time as the general election of 6 November 1993. It comprised a binary choice between the most popular option for change on the second question

(Mixed Member Proportional system was the most popular option with 65% of the vote) and the status quo. The MMP option won by 53.86% to 46.14%.<sup>16</sup>

**New Zealand 2011** New Zealand held another referendum on the voting system in 2011. It was a similar model to the 1992-93 process but this time the first (and as it turned out only) referendum was held at the same time as the general election of that year (on Saturday 26 November 2011). Again voters were asked two questions. The first gateway question asked if they wanted to keep the Mixed Member Proportional voting system or change to another voting system. The second – filter – question offered four alternative options. On the first question voters chose to keep the MMP voting system by 57.8% to 42.2%. This meant that the result of the second question was not taken into account. There was of course no need to plan for a second, run-off referendum which was provisionally planned to coincide with the next general election which was due by end of January 2015.

#### **D. Gateway and final decision model in one referendum**

**Puerto Rico 2012** A referendum is planned for 2012 in Puerto Rico on the territory's constitutional status. It is intended that this will coincide with the November general election.

The format of the referendum will differ from the 1967 plurality model. It will in fact be similar to the New Zealand model in that a first, gateway question will offer voters the chance to vote for the status quo (Commonwealth status) or a change in status. A second question, the result of which will be taken into account in the event of a majority vote for change in the first question, will then offer voters three options for change: whether they would prefer a form of independent nation-statehood; the possibility of becoming a state within the United States constitutional structure; or nationhood in free association with the United States (building on the current Commonwealth status). This will again be decided on a plurality model.

There had been initial discussion around having two referendums, again like New Zealand – the gateway question in August 2012 followed by a second referendum offering three options to coincide with the November elections. Notably this plan did not include a filter stage after the gateway stage, narrowing down the three options of change leading to a run-off either between the two most favoured or the one most favoured and the status quo. In any event the plan changed and it is now intended to have both questions on the same ballot in November. One issue here is arguably the prejudicing of the status quo. It is possible the commonwealth status could lose narrowly to a change in status by a narrow margin but then on the second question a model for change could be successful with a smaller percentage of the vote than commonwealth status got in the first vote.<sup>17</sup>

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<sup>16</sup> For an account of these referendums, voting patterns etc. see P. Aimer et al, *Toward Consensus?: The 1993 Election and Referendum in New Zealand* (Auckland UP 1995), chapter 10.

<sup>17</sup> Rafael Cox-Alomar, 'Setting the Record Straight on the Puerto Rican Plebiscite', *The Jurist*, 7 March 2012, <http://jurist.org/hotline/2012/03/rafael-cox-alomar-status.php> There is every likelihood that the US government will refuse to implement any change to the territory's status endorsed in the referendum.

## 5. Assessing the different methods of decision-making by way of a multi-option referendum

### (i) Democratic Standards and the Referendum

In assessing the democratic merits or demerits of different models of multi-option referendum I will turn to the principles of civic participation and deliberative democracy which many consider to be essential to referendum good practice. In a recent monograph I argued that a referendum is a potentially positive device in processes of constitutional change.<sup>18</sup> This is because the referendum allows citizens to be actively engaged in directly determining the fundamental rules by which they will be governed. Despite this general predisposition however, I note that referendum practice has been plagued with a number of democratic problems including: elite manipulation of the referendum process; a lack of deliberation in the process from the referendum's initiation through to the campaign and polling processes; and the risk to minority interests of a referendum result which suits the winners but takes no account of the interests of those voting for another option(s) and minority interests more broadly. I have argued that in order to meet the highest deliberative standards a constitutional referendum must:

- (i) facilitate and where possible enhance the *active participation* of citizens throughout the process and not just at the moment of voting;
- (ii) facilitate *public reasoning*; an endeavour which includes providing sufficient time and space for reflection on, and discussion of, the issues at stake both by political elites and by citizens and civil society more broadly. In addition, referendum organisers should help facilitate well-informed decision-making by ensuring citizens are equipped with objective and non-partisan information concerning the issues at stake during the referendum campaign; and
- (iii) maximise *collective consent* among assenters and *satisfaction with the process among dissenters*. To arrive at a conclusive settlement of the issue it is important that, on the one hand, efforts are made to find a model of constitutional reform that suits a broad plurality of citizens rather than a bare majority, and that, on the other, the process is seen to be scrupulously open and fair by all participants, including those who did not vote for the successful option.

These principles are not specific to the design of multi-option referendums but to differing extents they do assist in assessing the merits and demerits of the different decision-making models available for multi-option referendums.

### (ii) Reviewing the available Models

#### A. The 'run-off' model using two referendums

From one perspective the two referendum model enhances participation by allowing citizens to take part in two separate constitutional events. It can also facilitate a longer period of public reasoning by extending the time available for reflection and

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<sup>18</sup> S Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2012).



discussion, as voters have a second referendum to address the issue anew with a narrower range of options.

From another perspective there are objections to a two referendum model. The first of these is a practical objection. It is expensive to hold a referendum and it may be thought too expensive to stage two when the issue can be settled by one referendum. In a related way there would be a duplication of the bureaucratic and organisational challenges that attend the organisation of any referendum. (Although, one strategy used in New Zealand is to combine a second referendum with another election which presumably reduces organisational costs.) The second objection, however, concerns the deliberative quality of the process itself. Research shows that while public interest in constitutional matters can be stimulated by a referendum event, there is a danger that citizens will switch off if the process is too long. In its submission to a recent House of Commons Scottish Affairs Committee Inquiry the Electoral Reform Society argued against a two referendum model:

‘We feel that both questions should be asked on the same day on the same ballot paper as there is merit in voters being able to compare three relative alternatives at the same time during the same campaign. That said, no method of discovering voters’ views is entirely risk free. Although extremely unlikely, in our recommended system there could potentially be an outcome where people only vote on the first question and hence those voting for a particular system are fewer than those who have voted for no change. It will be important to advise voters to use both of their votes in this situation. However disparity of turnout between two questions is actually more likely should they be asked at different times.’<sup>19</sup>

I offer no comment as to how likely such a ‘deliberation deficit’ would be in the Scottish context but if a two referendum model were to be used some thought would need to be given as to how voters would react to a such a period of constitutional deliberation, whether citizen engagement could be sustained over two referendums, whether lower turnout in the second referendum was a significant risk, and whether such a model would be preferred by citizens to a one referendum model. Another issue is timing. If it is important to reach a decision within a particular time-frame a second referendum might be an impediment to this. If a second referendum is held very soon after the first there may not be much additional time for further deliberation, and so in terms of public reasoning there may not be much value added by a second referendum held shortly after the first; although two referendums held close together might reduce costs.

### **B. The plurality model with no ‘50% plus’ majority threshold**

A plurality decision-making approach is rarely taken in referendums today; the most recent example of an important state-wide referendum I have found is from Sweden in 1980. Notably the two Swedish examples I have looked at which use this model were advisory in nature and the results served to inform the development of future policy rather than to settle the issue. This was also the model used in the three Puerto Rican referendums addressed above.

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<sup>19</sup> House of Commons Select Committee on Scottish Affairs, Report: The Referendum on Separation for Scotland’, HC 1608, 2010-12.  
<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmsscota/1608/1608we30.htm>

The Swedish experience in particular suggests that such a model of multi-option referendum has clear difficulties. The lack of a requirement that a winning option must secure over 50% of the vote led to dissatisfaction in Sweden on the occasions where this model was used. That the referendums were advisory in nature also enabled opponents of the most popular option to oppose its implementation. Another example is the plebiscite on the Australian national anthem.

Of course it might well be asked why referendums cannot be decided on a plurality basis when other elections are concluded in this way. Although this is widely accepted for the election of officials in first past the post electoral systems, it is widely viewed as inappropriate for the making of a major constitutional decisions. The main objection would appear to be that referendums, particularly those determining matters of the highest constitutional consequence, require a more conclusive result. By the third principle I have out-lined above (the conclusive determination of an issue, the arrival at an option that enjoys broad plurality support, and the maximisation of satisfaction with the process among dissenters), the plurality model would seem to be problematic.

Another consequence is that, besides not necessarily delivering over 50% support for any one option, this model can result in a very close decision between two or more options. For example, in a three option referendum all three could poll approximately 33% of the vote, or the leading two options could be very close as we saw in Sweden in 1980 where they polled very similar results in the high '30s (the 1957 referendum also had two options polling significant levels of support with no one option over 50%). The results in Finland 1931 and Puerto Rico in 1967 were of course more convincing, but this was a matter of chance, with one of the three options in each case happening to poll over 50% of the vote.

If the plurality model were to be used, one rule which might help overcome the inconclusive result objection would be to set a 50% plus 1 (or higher) threshold or quorum for the success of a winning outcome. We saw this in Singapore in 1962 where the winning option needed two thirds support to effect constitutional change. The issue of thresholds/quora is of course a much broader matter in itself which I do not specifically address in this Memorandum.

To summarise, a plural approach to determining the outcome of a multi-option referendum concerning major constitutional issues has not been recently used and seems to be prey to considerable democratic and practical objections.

### **C. Gateway, Filter and 'run-off' model over two referendums**

As operated in New Zealand this was a three-stage model organised over two referendums.

Stage 1 was a choice between status quo and change.

Stage 2 was a vote to select one model of change from 4 options.

Stage 3 was a run-off in a second referendum between the status quo and the most popular option emerging from Stage 2.

This model avoids some of the problems that attend the plurality model and arguably also attend the preferential voting and proportional decision-making model (see **E.** below), in that at Stages 1 and 3 over 50% support in a binary vote is needed to be

secured, respectively on the principle of change, and then for a specific model of change to be validly endorsed as a replacement for the status quo.

Notably, at Stage 2 in New Zealand 1992 one of the four models itself polled over 50% of the vote. But it is of course possible that the most popular model at this stage will not secure majority support. Such a scenario raises questions as to how legitimate this option is as a truly popular alternative to be set against the status quo at Stage 3. Arguably these questions are answered at Stage 3 where this model then requires majority support vis-à-vis the status quo for its endorsement.

In terms of the principles of citizen participation and deliberation this model has much to commend it. As a two referendum model it enhances citizen participation and allows more time for deliberation by citizens over the two referendum format. The other potentially positive and negative considerations in holding two referendums rather than one as discussed in relation to the Newfoundland referendums would again apply when considering such a model.

Another important issue is how the different constitutional options to be proposed at Stage 2 are arrived at. In New Zealand the referendum was preceded by a Royal Commission of Inquiry into the Electoral System which helped inform the decision on the range of options from which the public were invited to choose.<sup>20</sup> The role of the Royal Commission in drawing up the multiple options to be offered at Stage 2 also allowed time for both elite and popular deliberation in this process. The arrival at a number of options also gave a plurality of choices for people to choose from, minimising the risk that a popular option was missing from the ballot.

From other perspectives there are possible draw-backs. It is notable that in New Zealand the second referendum was held over one year after the first. On the one hand this allowed more time for deliberation, from another point of view it could be seen as an unnecessary delay in arriving at a constitutional decision. Such considerations would depend from case to case on the nature of the issue being determined. I have noted above the deliberative reasons the Electoral Reform Society gives for preferring a one referendum model.

Another possible criticism is the privileging of the status quo in the New Zealand model. The status quo was a guaranteed option at Stages 1 and 3; i.e. it was a default position at Stage 3 even if it had been heavily defeated at Stage 1. However, in many ways this is not unduly surprising. Constitutions tend to operate from the default position of stability and many require super-majorities within the institutions of government to bring about change. The decision as to whether or not to privilege the status quo in a multi-option referendum is one that would again need to be taken from system to system based upon various factors including the nature of the issue being determined and traditions of constitutional change within a particular constitutional system.

Overall the New Zealand model appears to have worked successfully. It is notable that when a referendum was held again on the issue of electoral reform in 2011 the

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<sup>20</sup> For a favourable review of such a process see V. Bogdanor, *The Coalition and the Constitution*, (Hart, 2011) 92.

people voted to retain the system endorsed by and implemented after the 1993 referendum.

Of course it would be possible to use this model in the Scottish context. The gateway question could lead to a filter question between the two (or more) proposed alternatives to the status quo. Rather than accepting that a majority vote for one of these options was sufficient ratification of that option, there could be a run off between this option and the status quo in due course if this was thought necessary.<sup>21</sup> It is notable, however, that this three stage model was used in the context of four alternative proposals to the status quo. It might be argued that two referendums are not needed when only two alternatives to the status quo are being deliberated and that models A, B and C considered at **Section 6** below are more appropriate one referendum models for such a scenario.

#### **D. Gateway and final decision model in one referendum**

As observed, the anticipated Puerto Rico 2012 model is similar to New Zealand except that it has only two stages and these take place in the same referendum.

Again general debates about the advantages and disadvantages of a one referendum v two referendum model, as discussed at **A.** and **C.** above apply.

With a one referendum model, and in light of the importance of public reasoning, organisers of a referendum need to ask whether they can help ensure sufficient scope for deliberation on the different options being offered, and whether they can ensure that voters understand the implications of any choice or choices they might make.

One important issue is how well the different options are explained to voters ahead of the referendum. This raises issues about the provision of objective information to citizens during the campaign etc.

Another broader concern is whether the different options and their constitutional implications have themselves been fully worked out. In New Zealand as mentioned a Royal Commission was used to set out the different options to be offered in the referendum.

As discussed in **C.** above, it might be argued that a one referendum model is more appropriate when only two options beside the status quo are being considered. In the New Zealand referendum of 1992 Stage 2 was a filter stage to narrow down the alternative options to the status quo (although no such second filter stage is planned for Puerto Rico in 2012). It is arguably easier both to explain the different options to citizens ahead of a referendum and to arrive at a satisfactory decision-making model within one referendum when only two options in addition to the status quo are the

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<sup>21</sup> Peter Kellner has mooted the possibility of a second referendum after negotiations on whichever option won at Stage 2. House of Commons Select Committee on Scottish Affairs, Report: The Referendum on Separation for Scotland', HC 1608, 2010-12.

<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmsscota/1608/1608we14.htm>

As suggested above, support for the New Zealand model was voiced in Vernon Bogdanor's written evidence to the HC. House of Commons Select Committee on Scottish Affairs, Report: The Referendum on Separation for Scotland', HC 1608, 2010-12.

subject of the referendum. I will address a series of models at **Section 6** as to how a one referendum format might work.

### **E. Preferential voting and proportional decision-making**

This is not a model that has been adopted in any of the examples discussed above, but as a possible model of multi-option referendum decision-making it should be addressed.

To take one example of a preferential model of multi-option referendum, a decision could be arrived at by a form of alternative vote. Voters would be given a list of options and asked to rank them. If no option won over 50% of first preference votes then second and third preferences could be taken into account. There is of course a range of ways in which a particular option could then be deemed to have won. In considering such a model it is perhaps relevant that the Scottish electorate is accustomed to preferential voting since a single transferable vote applies in local government elections.

The viability of such a model would arguably depend to a large extent upon the mutual coherence of the different options on offer. Psephologists argue that such a model works best where the different options relate to each other on a continuum more/less preferable scale rather than an either/or scale. If such a model were to be used for a referendum, therefore, there would need to be convincing evidence that the options did relate in this way. One difficulty would be if there were options on the ballot which a number of voters actively opposed – not wishing even to list these as weakest preference – or if popular options were omitted. The latter point is a broader issue for referendums in general, as discussed in relation to Singapore in 1962. This was also an issue in Australia in 1999 where a referendum offered a binary question on the head of state, omitting the option of a directly elected head of state which polls later showed would have been more popular than the two options which were offered. Arguably giving a ‘none of the above’ option would help surmount the first of these difficulties but it would not enhance the notion that the winning option enjoys broad plurality support.

Another objection is that the winning option may not have over 50% of first preference votes. This could lead to a criticism similar to that levelled at the plural voting model above – namely that the result is insufficiently conclusive. On the one hand it might be argued that such a model would result in an outcome that enjoys broad plurality support; on the other, there is the recurring issue of a major constitutional decision being endorsed by fewer than a clear majority of first preference votes. What impact would such a result have in terms of satisfaction with the process among dissenters?<sup>22</sup> If it is felt that a referendum on major constitutional

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<sup>22</sup> Professor Iain McLean in written evidence to the House of Commons Select Committee on Scottish Affairs stated that the alternative vote model is ‘a terrible system for any situation such as a referendum where a single option must be chosen’. He nonetheless suggested that a form of preference vote would be the best way to structure a multi-option ballot since it would be possible to find a ‘Condorcet’ (see below) winner this way. House of Commons Select Committee on Scottish Affairs, Report: The Referendum on Separation for Scotland’, HC 1608, 2010-12.

<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmsscotaf/1608/1608we18.htm>

For an account of how to find a winner using a preferential vote as an alternative to a multi-question vote see also Professor Denis Mollison’s written evidence to the same committee: House of Commons

change is such a polity-defining process that a majority vote in favour of that option needs to be secured to reach a conclusive outcome then this model would seem to be lacking.

## **6. Assessing how a decision might be reached in a three option/two question referendum**

The New Zealand model was designed for the situation where there are multiple alternatives to the status quo. The Puerto Rican scenario proposed for 2012, although intended to be settled in one referendum, also contains more than two options in the second question.

I will now address how a model might be designed for the situation where, in addition to the status quo, only *two* alternative options are proposed within the referendum.

There are at least three possible ways in which a decision could be reached in a two stage referendum. I will assess each of these in line with the democratic criteria used in **Section 5**. I will begin by contrasting the first two of these models:

### **Model A. The Change/No Change Gateway Model**

Stage 1: a question is posed asking voters if they favour constitutional change or not.

If there is a majority vote for change at Stage 1, the outcome of Stage 2 would apply:

Stage 2: a question is posed asking voters for their preference between two options for change.

CONTRAST WITH:

### **Model B. The 'Knock-out' Model**

Stage 1: a question is posed asking voters for their preference between the status quo and a first option for constitutional change.

If there is majority support for the model of change proposed at Stage 1 this would be considered to be the winning option. If there is majority support for the status quo the first option for change is 'knocked out' and the result of Stage 2 would apply:

Stage 2: a question is posed asking voters for their preference between the status quo and a second option for constitutional change.

In light of the New Zealand experience it can be argued that both Models A and B have the potential to arrive at a decisive outcome. In Model A, for an option of constitutional change to succeed there would need to be a majority vote for the principle of change and then subsequently for a particular model of change. In Model B for an option of constitutional change to succeed there would need to be a majority vote for such a model either at Stage 1 or Stage 2.

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Select Committee on Scottish Affairs, Report: 'The Referendum on Separation for Scotland', HC 1608, 2010-12. <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmscotaf/1608/1608we34.htm>

One criticism of both of these models however is that in each scenario it may not be possible to identify a ‘Condorcet winner’ – i.e. an option which is preferred by most voters when set against the other options, one by one, in a succession of binary questions. In a three option competition for example, Option 1 wins by the Condorcet test only if it is preferred to Option 2 in a 1 v 2 question, and to Option 3 in a 1 v 3 question.<sup>23</sup> Of course a Condorcet winner is an ideal outcome, and it is not always possible to achieve such a result no matter how well a multiple option election of any kind is designed. It may simply be that when all three options are set out into three binary option groups no one option emerges as more popular each time it is posed against another.

Nonetheless, given that it is a way to arrive at a more conclusive decision, maximising plural consent, and presumably also satisfaction with the process among dissenters, there are ways to try to arrive at a decision that is more likely to be a Condorcet-compatible outcome. With this criterion in mind we can assess models A and B in light of their respective propensity to reach Condorcet compatibility.

To begin, each of the two models A and B leaves a potentially unasked question. In Model B, if the option for change offered at Stage 1 is, for example, ‘independence’ and this wins over 50%, ‘independence’ would win even though it might come second in the Stage 2 process vis-à-vis a second option for change, e.g. some form of increased devolution. Therefore, there is a risk, as observed by a number of commentators, that the option for change presented in Stage 1 would win even though it was a less popular model of change than that presented in Stage 2. This would be democratically problematic. The result would arguably not be decisive and it would presumably generate considerable levels of losers’ dissent among those who preferred the option for change on offer at Stage 2. There is also the issue of how Stage 2 votes would be recorded. Either Stage 2 votes would not be recorded in which case many people would presumably be dissatisfied if exit polls showed stronger support for the Stage 2 option for change, or the data on Stage 2 voting would be released and the anomaly between the two outcomes would be fully exposed.

In Model A there is also a risk of Condorcet incompatibility. For example, in the event of a majority vote for change at Stage 1, the outcome of Stage 2 would take effect. However, it is conceivable that a majority of voters who voted for the principle of change at Stage 1 would see a model of change succeed at Stage 2 which if paired with the status quo they would have voted against. In other words, a model of change would succeed at Stage 2 which would have failed to win in a run off vote with the status quo had the model used in New Zealand in 1992-93 been adopted.

However, it also seems to be the case that the risk of Condorcet incompatibility in Model A is less significant than in Model B. People with a strongly negative attitude towards one of the two available options in Stage 2 can opt for the status quo at Stage 1. It would also be possible to tell from polling, from sample groups etc., the extent to which people view the two models of change on offer at Stage 2 as being in some sense preferentially sequential; in other words, the extent to which people whose first preference is one of these two models of change state a second preference for the

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<sup>23</sup> See Iain McLean’s written evidence to the House of Commons op cit and his references to a ‘majority winning option’ and a ‘well-behaved choice system’.

other model of change vis-à-vis the status quo. In the context of the Scottish situation in particular, a prominent psephologist Professor Curtice, taking account of polling on people's constitutional preferences, has taken the view that:

'A Condorcet winner usually exists when voters' preferences are arranged along a single dimension, such as from left to right. It appears to be the case that most voters' preferences in respect of Scotland's constitutional future do have this character, and that consequently a Condorcet winner probably does exist in the form of remaining in the UK but with the Scottish Parliament having significantly enhanced powers.' [It should be noted however that it seems to be Professor Curtice's view that Model B is more likely to deliver a Condorcet-compatible model.<sup>24</sup>]

### **Model C. The Preferential Model**

If it is felt either that the status quo is not being properly respected in either Models A or B, or that the mode of decision-making in Model B privileges the first option of change, there is a third model available. This poses the same two questions as Model B but the mode of determining the result differs:

Stage 1: a question is posed asking voters for their preference between the status quo and a first option for constitutional change (Change 1)

Stage 2: a question is posed asking voters for their preference between the status quo and a second option for constitutional change (Change 2)

In the event that only one option for change is more popular than the status quo it would win; in the event both options for change are more popular than the status quo the more popular between these would win.

This would technically leave unanswered the Condorcet issue of the preference of voters for Change 1 v Change 2, but this would seem to be answered in all but a technical sense by the level of preference each of these generate vis-à-vis the status quo.

One difficulty with this model is a risk of tactical voting. Voters who favour a particular model of change might elect to vote for the status quo in preference to the other model in order to enhance the chances of success for their preferred model of change, even though in terms of overall preference, and absent such a ballot process, the other model of change would be their second preference. This is a risk but it is difficult to see how it is democratically problematic. People feeling sufficiently strongly in favour of one model of change are presumably entitled to vote against another.

To conclude on the Condorcet point, all three models A-C would ensure that, to be successful, a model of constitutional change must win over 50% support in a binary vote against either the status quo or another option for change. It seems that models A

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<sup>24</sup> John Curtice's written evidence to the House of Commons op cit. He elaborated upon this view in oral evidence to the House of Commons Scottish Affairs Committee: House of Commons Select Committee on Scottish Affairs, Report: The Referendum on Separation for Scotland', HC 1608-iv, 2010-12  
<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmscotaf/uc1608-iv/uc160801.htm>



and C would each be more likely than Model B to arrive at an outcome where it can be concluded with reasonable certainty that the winning option is preferred to the two other options by a majority of voters. If there is a concern that in Model B the option for change offered at Stage 1 is being privileged then Model C would ensure that any successful option for change, whichever that may be, is not only favoured by voters over the status quo but also receives more votes than the other option for change. In Model A a successful option for change would also need to secure more votes than the other option for change.